State of Colorado

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State Personnel Board
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AGENDA
PUBLIC BOARD MEETING
June 21, 2005

A public meeting of the State Personnel Board will be held on **Tuesday, June 21, 2005, at Colorado Department of Transportation, 4201 East Arkansas Avenue, Second Floor Auditorium, Denver, Colorado 80222.** The public meeting will commence at 10:30 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-764-1472 by June 15, 2005.

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I. REQUESTS FOR RESIDENCY WAIVERS

A. June 1, 2005 Report on Residency Waivers

Reports are informational only; no action is required.

II. PENDING MATTERS

There are no pending matters before the Board this month.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

A. John J. Deelman v. Department of Education, Colorado School for the Deaf and the Blind, State Personnel Board case number 2005B020.

On December 27, 2004, the Administrative Law Judge issued a Dismissal Order. Following an appeal of that order, Complainant filed his Opening Brief of Appeal on April 13, 2005, in which he requests that the Board reverse the dismissal of his case on the basis of lack of timeliness without good cause, stating as follows:

- There were no defining factors or qualifying points as what is considered good cause offered to support the decision to dismiss by the ALJ, thereby showing that the basis for dismissal is "a matter of personal interpretation."

- The definition of good cause from the Colorado Code of Regulations has a broader scope and parameters, allowing for a wide range of variables, mitigating circumstances, considerations, and levels of applicability.
- Due to job-related stress and trauma, Complainant was placed on medical leave on November 7, 2003; his "fitness to return to work" meeting with Carol Hilty, Acting Superintendent at CSDB, took place on May 19, 2004.
- During his absence, he received a letter on January 6, 2004, from Dr. Marilyn Jaitly, Superintendent, stating there were some issues to be addressed in addition to his medical condition, one of which was an email letter sent to all staff on November 8, 2003, which Dr. Jaitly deemed to be inappropriate, hostile, and a violation of violence in the workplace policies and two prior corrective actions.
- During the May 19, 2004 meeting, Complainant discussed his health status, the email, his relationship/involvement with another CSDB employee, and his intention to complete his retirement and purchase PERA service credit in lieu of physically returning to work with Ms. Hilty.
- Following a trip to California, Complainant returned to Colorado on June 6, 2004. On June 8, 2004, Complainant received a letter from CSDB, the notice of disciplinary action or termination letter, dated May 28, 2004.
- Complainant had been set up, lied to, and terminated, which led to "a succession of intense random panic attacks (called "RPA's) [sic] that extended over the next three days."
- Quoting from Employment Law (Covington & Decker), p. 511, Chapter 10, Complainant asserts that in any employment relationship, there are both oral promises and implied promises; he alleges that Ms. Hilty violated the terms of the oral agreement between her and Complainant.
- "The intentional breach of agreement between Ms. Hilty and myself shows that the lack of timeliness, on my part, was an unavoidable occurrence."
- "Therefore, the Lack of Timeliness in filing, by definition, cannot reasonably be attributed to any act or omission on my part as evidenced by the facts" and under the circumstances, no individual could have been reasonably expected to comply with the rules for timely filing.
- In addition, Complainant's response to the Order to Show Cause in November was only one business day late, due to an automobile accident in the State of Nevada, which resulted in Complainant's car catching on fire and his visit to Lake Mead General Hospital. This situation falls under the category of serious family emergency.
- Complainant requests that his appeal be placed under the jurisdiction of the Board and the Board seriously consider the amount of time and effort he has devoted to the pursuit of the appeal, even while under a doctor's care for anxiety and clinical depression.

On May 2, 2005, Respondent filed Respondent's Second Motion to Dismiss Appeal, requesting that the Board dismiss Complainant's appeal and stating:

- "[C]omplainant has persistently failed to serve copies of his pleadings" on the Assistant Attorney General.
- The Assistant Attorney General did not receive an appeal brief from Complainant.
- If Complainant did file a brief and did not serve the Assistant Attorney General, then it was an *ex parte* communication.
- "Failure to serve a copy on the opposing party may result in dismissal." Board Rule R8-58.
- Complainant was "made aware that the rules require service upon opposing counsel, and that dismissal is one consequence of failure to do so."

On May 18, 2005, Complainant filed additional information. On June 6, 2005, Respondent filed Respondent's Response to Complainant's Filing, essentially stating that the May 18, 2005 filing "has no bearing on any issues that are pending before this Board."

B. David Teigen v. Department of Corrections, State Personnel Board case number 2003B127.

Complainant, a case manager, appealed the abolishment of his position and denial of retention rights. After hearing, the ALJ found that Respondent violated the layoff statute and Board layoff rules by failing to consider seniority in total state service in abolishing Complainant's CM III position prior to that of an employee in a more junior time band; Respondent violated Complainant's statutory retention rights by refusing to allow him to exercise them; Complainant proved that he was passed over for a Correctional Officer V position at Territorial because he filed his appeal; DOC sought to avoid having to undertake the work of processing retention rights, and therefore simply sent email edicts denying employees those rights, an act which was arbitrary and capricious; and Complainant is entitled to an award of attorney fees and costs. In the Initial Decision of the Administrative Law Judge of January 31, 2005, the ALJ ordered that Complainant is reinstated to the CM III position retroactive to May 2003; Respondent is to pay Complainant's attorney fees and costs incurred in this actions; Respondent is to rescind the August 15, 2003 memorandum and is ordered to refrain from retaliating against Complainant for filing his appeal.

On May 25, 2005, Respondent filed Respondent's Brief on Appeal, stating the following as issues:

1) Whether it was error to conclude that DOC willfully disregarded the law governing layoffs, refused to use reasonable diligence and care to procure evidence required to be considered, and refused to comply with the layoff statute and rules by ignoring seniority in state service; and

2) Whether it was error to conclude that DOC's action in this case was frivolous, taken bad faith and willful violation of clearly established legal principles, thus meeting the standards set forth in Board Rule R-8-38 as grounds for an award of attorney fees and costs.

Respondent argues as follows:

- The ALJ's decision demonstrative bias and unfair treatment against DOC and requires her recusal from consideration of this case.
- Her statements that "In view of DOC's official policy of retaliating against employees who have filed appeals with the State Personnel Board an award of attorney fees and costs is essential here" and "this case illustrates a pattern of institutional hostility to the state personnel system and to employees who file appeals within that system" are simply outrageous.
- There was no evidence that DOC ever had an official policy of retaliating against employees for exercising their rights as state employees.
- There is no evidence that Executive Director Joe Ortiz, Human Resource Director Madline SaBell, Director of Prisons Nolin Renfrow, Warden James Abbott, and Human Resource Specialist Richard Thompkins abuse or retaliate against other employees using the State Personnel Board process.
- SaBell brought in two personnel experts from the Department of Personnel and Administration (DPA) because she was so concerned with ensuring that the layoff process was in accordance with Board rule.

- The ALJ owes these employees an apology for her outrageous conclusions in the initial decision, which are published on the web site and are available for all the world to see.
- The ALJ should have recused herself from hearing this and any other DOC case if she believes DOC has an official policy of retaliating against its employees.
- The ALJ's ruling is based on the erroneous conclusion that Complainant's position was abolished; his position was not abolished, position number #31030 was never abolished, Complainant is still in that position, Complainant is currently being paid under that position number, and the only change was to Complainant's duties.
- The ALJ rejected DOC's proof that Complainant's position was not abolished because DOC says it "saved" Complainant's position. "Saved" only means the position as on a list to be abolished and on July 1, 2003, Ortiz wrote a letter to Complainant telling him additional funds had been located and his position would be removed from the list to be abolished.
- The testimony was that Complainant was working out of class, personnel rules allowed for working out of class, and working out of class for periods of many months is not uncommon.
- Complainant never lost any pay, never incurred expenses like Clementi, never changed facilities, work location, work shift, or work supervisors.
- Complainant was not laid off, never separated from employment, lost no pay, status or tenure, and thus had no bumping rights.
- There is no evidence that DOC targeted or retaliated against employees who filed appeals at the Board.
- The ALJ "improperly admitted and then twisted an internal DOC memorandum to support her conclusion that DOC targeted or retaliated against Teigen in the layoff process," a contention not supported by evidence.
- The memorandum is dated August 15, 2003, three months after Complainant filed his appeal on May 15, 2003; it is simply time-barred.
- Complainant must not be allowed to bootstrap facts or events that occurred many months or years after his appeal as reasons in support of his appeal.
- Complainant's appeal does not allege retaliation; rather, the ALJ allowed the addition of this claim, although DOC objected to it and to the use of the August 15, 2003 memorandum.
- SaBell testified that the memorandum was her idea, statements leading to it were made in a settlement context, and this is not evidence of discrimination against Complainant.
- DOC's action in this case does not reflect the criteria necessary for an award of attorney fees and costs.
- Complainant cannot be reinstated into a position that he has always held, as ruled by the ALJ; since there is no new relief, there is nothing to support an award of attorney fees.
- The ALJ's statements about "institutional hostility" are completely unsupported in the record.
- DOC's interpretation of Board rules had a reasonable basis; thus, they cannot be said to have been taken in bad faith, instituted frivolously, or been groundless; the award of attorney fees should be set aside.
- The initial decision doesn't make sense and should be reversed.

On June 8, 2005, Complainant filed Complainant's Motion for Leave to File Response Brief in Excess of 10 Page Limit and Complainant Dave Teigen's Response Brief, stating as follows:

- The legal standards governing this case include: (1) Failure to file proper exceptions results in waiver of the right to appeal issues not timely or properly

raised (*State Board of Registrations v. Brinker*, 948 P.2d 96 (Colo.App. 1997)); (2) The Board is precluded from modifying a factual finding, even though there is contrary evidence somewhere else in the record (*Puls v. People, ex rel Woodard*, 722 P.2d 424 (Colo.App. 1986; *Colorado State Board of Medical Examiners v. Hoffner*, 832 P.2d 1062 (Colo.App. 1992)); (3) The credibility of witnesses and weight to be given to their testimony is within the sole province of the ALJ (*Barrett v. University of Colorado*, 851 P.2d 258 (Colo.App. 1993)); (4) Although the Board has authority to make determinations of ultimate fact, the Board is required to follow the law established by the Courts and if there is no reasonable basis in fact or law for the ultimate conclusion reached by the Board or where the Board refuses to follow the law, the actions of the Board will be reversed (*Moczygemba v. Colorado Department of Health Care Policy and Finance*, 51 P.3d 1083 (Colo.App. 2002)).

- The State Personnel System is organized by class groupings, and the Board has no authority to interfere or subvert the director's authority to create classes and must support the director's power and discretion. *Renteria v. State Department of Personnel*, 811 P.2d 797 (Colo. 1991).
- The leading case interpreting layoff principles under the state personnel rules and statutes is *Halverstadt v. Department of Corrections*, 911 P.2d 654 (Colo.App. 1995), which is cited in *Hughes v. Department of Higher Education*, 934 P.2d 891 (Colo.App. 1997), and utilized for the holding concerning the dual meaning of retention and the requirement of abolishing positions by seniority within each class.
- The *Teigen* case is dissimilar from *Hughes* in that the record clearly establishes multiple violations of the statutory and regulatory schemes.
- Two other cases dealing with reorganization and layoff which are helpful in the analysis of the instant case are *Department of Human Services v. May*, 1 P.3d 159 (Colo. 2000) and *Velasquez v. Department of Higher Education*, 93 P.3d 540 (Colo.App. 2003), the former for reorganization principles and the latter for the burden of proof in a layoff case falling upon the employee.
- DOC's argument on the ALJ is unfounded, reprehensible, and meritless; no authority is provided for the position; Respondent's Brief on Appeal fails to demonstrate any legal basis for the challenge; at no time prior to the Initial Decision was an objection made to Judge McClatchey sitting as ALJ; no record was made during the prehearing or hearing stage; and failure to time raise such an objection is a bar by waiver to asserting the claim. *Aberg v. District Court*, 319 P.2d 491 (1957); *Department of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984).
- The law is clear concerning disqualification, the foundation for which must arise from facts independent of the decisions of the judge that are made on issues before the judge. *Mountain States Tele. & Company v. Public Utility Commission*, 376 P.2d 1020 (Colo.App. 2003); Venard v. *Department of Corrections,* 72 P.3d 446 (Colo.App. 2003); and *M Life Insurance Company v. Sapers and Wallack Insurance*, 40 P.3d 6 (Colo.App. 2001).
- "DOC's objective to judge shop is evidenced by the improper *ex parte* communication that was sent by Ortiz through Wells, even though ALJ McClatchey has not been a disfavorable judge for DOC."
- DOC's argument concerning the abolition of Complainant's position is contrary to the evidence; Complainant's position as a Case Manager III was abolished and the record is full of evidence demonstrating this.
- After DOC abolished Complainant's Case Manager III position, it created a new Correctional Officer IV position, gave Complainant's position number to the CO IV position, funded the position out of the Correctional Officer series budget line, and moved Complainant into the Correctional Officer series and into a position to which he had never been certified.

- DOC illegally reorganized without a reorganization plan; the result was that Complainant was forced to work out of class for a period approaching 1 1/2 years, which was wrong and illegal.
- DOC's argument that it did not allow Complainant to exercise his statutory and rule protected bumping rights because his position was never technically abolished is without rationale.
- The August 15, 2003 Renfrow memorandum is on its face illegal and retaliatory because it explicitly targets employees who filed appeals and creates an illegal blacklist designed to deprive employees of job opportunities because they filed appeals.
- The argument that the August 15, 2003 memorandum should be precluded from evidence because it was issued subsequent to the notice of abolition of position and is not germane to issues under appeal is incorrect. On the contrary, the memorandum is directly relevant to: (1) the issues under appeal and relates to the question of why Complainant was not allowed to perform Case Manager III duties and return to a Case Manager III position; (2) malice and illegal motive; (3) the arbitrary and capricious actions directed against Complainant; and (4) the award of attorney fees and costs.
- The exhibits listed by Respondent in its Prehearing Statement go far beyond the July 2003 time period and encompass events in later 2003 and 2004; in addition, Complainant's Prehearing Statement lists the creation of the blacklist as an undisputed fact and DOC never objected to such listing of the blacklist as illegal retaliation and wrongful conduct as an undisputed fact in the Amended Prehearing Statements, at the time of the presentation of preliminary matters in the evidentiary hearing, or during opening statements.
- The blacklist documents were not the idea of Ms. SaBell; in fact, SaBell testified that she never saw the documents, and the Board needs to clearly state to DOC that nothing like this in the future will be tolerated because there is no legal justifiable basis for issuing directives that are facially illegal and limit job opportunities fro employees who file appeals.
- The remedies ordered ("Complainant is reinstated to the CM III position retroactive to May 2003; Respondent is to pay Complainant's attorney fees and costs incurred in this actions; Respondent is to rescind the August 15, 2003 memorandum issued by Mr. Renfrow discussed herein; Respondent is ordered to refrain from retaliating against Complainant for filing this appeal") are necessary and appropriate because, among other reasons, Complainant must be ensured that he will be credited with uninterrupted service in the Case Manager class.
- Respondent's actions were done without consult of legal counsel in flagrant violation of the layoff rules, constituting bad faith, which mandates an award of attorney fees. *Mayberry v. University of Colorado Health Sciences Center*, 737 P.2d 427 (Colo.App. 1987).
- Fees are justified as a matter of public policy for all of above wrongful acts. *Mau v. E.P.H. Corp*., 638 P.2d 777 (Colo. 1982).

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

A. Benjamin Vialpando v. Department of Transportation, State Personnel Board case number 2005G002.

Complainant petitions the Board to grant a discretionary, evidentiary hearing to review the appointing authority's response to his grievance. Complainant argues that he was denied relief in the appointing authority's Step II grievance decision and that the final agency grievance decision was arbitrary and capricious because John Muscatell, Regional Transportation Director and the appointing authority of Region 6, failed to

address Complainant's allegations of discriminatory actions from his supervisor toward him and the hostile work environment which his supervisor has created toward him due to his national origin and ethnic background (Hispanic). Complainant argues that Respondent's actions have resulted in a "tangible loss" of wages by requiring him to work outside inspector functions and by failing to reclassify his position to an appropriate level.

Complainant is a certified Inspector I at CDOT's Traffic and Safety Section in Region 6, whose immediate supervisor is Nashat Sawaged and whose manager is Section Head Jake Kononov. On April 26, 2004, Complainant met with Kononov at Step I of his grievance to discuss:

(1) Job assignment:

- Complainant has continued to take care of the Roadside Outdoor Advertising ("RSA") issues for the region while being given additional job duties in Utilities in the northeast quadrant of the Metro Area and has been functioning at the level of Engineering/Physical Science ("E/PS") Technician (Tech) III since May 2003 in order to receive an upgrade to the E/PS Tech series;
- Complainant has not been given signature authority for Utilities in the past year, although the other three inspectors have it;
- Complainant has the same job duties as the E/PS Tech, but not the authority because he is not in the E/PS Tech series;
- Complainant has requested to return to his original job duties as the RSA Inspector via letter dated April 1, 2004, to Ali Imansepahi;
- Complainant has been told to continue doing Utilities and do only the RSA in the northeast quadrant of the Metro area, but Utilities has become excess work without monetary compensation or status;
- Sawaged made it difficult when Complainant asked for comp time for overtime due to him for the long hours he had worked in the past year and stated that maybe he should follow Complainant around, insinuating that maybe Complainant wasn't working;
- Complainant gave up a lot of extra hours worked and settled on 32 hours of compensation, to be taken one hour at a time, although the others (Greg Sinn and Roger Jameson) have been allowed to take comp time in segments much longer for days at a time;
- Before adding the Utilities job duties, Sawaged did not allow Complainant to take his vehicle home as the RSA Inspector, but other inspectors were allowed to take a vehicle home, informing him, "You can't because you are not like the other Inspectors and you need to report to the office first," implying that Complainant is not equal to serve the same privileges as the others;

(2) Hostile work environment:

- All three supervisors have created a hostile work environment for Complainant and others (Patricia Hayes) by trying to promote Sinn and Jameson, while Sawaged condones it and makes excuses for it;
- Sawaged is "excessively controlling and has a temper that interferes with my job and communication with him. He has created frustration, stress, and unnecessary work for me concerning the Roadside Outdoor Advertising issues";
- Sawaged forces his interpretation of what he thinks are the law and process for RSA, even after they have been explained by Larry Tannebaum, CDOT's attorney, and by Tom Riley, Statewide Coordinator for RSA;
- Communication between Complainant and Sawaged is characterized by tension, including Sawaged's forcefulness which is stressful for Complainant, and Sawaged's borderline threatening tone, yelling, shaking, and angry face;

- Sawaged goes off into different tangents and into religion during discussions with Complainant, and although he states that what is truly in his heart is to help Complainant, Complainant does not believe it;
- Kononov and Sawaged's intention is to get Sinn, Tom Norton's nephew, promoted;

(3) Support and political issues:
- Complainant does not have support from his current supervisors in doing his job as the Region RSA Inspector since Kononov has been Section Manager, is often reprimanded for communication with Headquarters and the Attorney General's office, and is ridiculed, rather than supported;
- Complainant is not allowed to work within the established process between Region 6 and Headquarters for issuing or resolving violations while other regions are allowed to do this;
- The supervisors create unnecessary political negotiations and more work for Complainant when he informs them of violations, which are potential political issues, although there is a process in place that he must follow when violations are issued;
- CDOT is inconsistent in applying the law and allowing the process to unfold;

(4) Advancement and career opportunity:
- Sawaged, Imansepahi, and Kononov have misrepresented the "Career Path Plan" to Complainant, and have taken his expertise in RSA and divided it into two equal areas for Sinn and Jameson (north and south), giving Sinn supervisory authority over Complainant in Utilities and in his own field of expertise and using this for the justification for the Position Description Questionnaire ("PDQ") submittal for an upgrade to the General Professional ("GP") IV level for Sinn and Jameson;
- Sawaged, Imansepahi, and Kononov have worked together to take away Complainant's opportunity for advancement into the GP series, handing it instead to Sinn and Jameson who have no experience or knowledge; the supervisors have manipulated Complainant and his job to justify their discriminatory actions; when Complainant mentions to Sawaged that he needs to oversee the RSA program and train Sinn and Jameson, he is told by Sawaged that he is only there to "give information," but not to supervise or train them; thus, he is made inferior to Sinn so that he can be promoted, and not given any acknowledgement for his efforts to train them; neither Sinn nor Jameson took any interest in learning the program until a few months ago (on January 22, 2004, Sawaged had a meeting with the section regarding RSA and what he expected of all the inspectors, the day after he helped Sinn and James change their PDQ's for GP IV);
- Kononov has made comments that the intent is to promote the Executive Director's nephew (Sinn) first, and his actions have verified this;
- Complainant has taken classes to get training, and has been told to take classes in engineering to advance, while Sinn and Jameson "are handed an opportunity to upgrade to a General Professional IV level with [sic] out having to meet the requirement of education or experience";

(5) PDQ:
- The PDQ's are being revised to reflect the job duties being performed by different individuals who are impacted by the reorganization of the permits unit, as stated by Sawaged;
- The PDQ's being processed are for Sinn and Jameson to get them into the GP IV classification;
- At the start of the reorganization, Complainant's PDQ was changed to the E/PS Tech III series, turned into Human Resources ("HR"), accepted, retracted by supervisors, and changed again since "it did not fit the plan for advancement for Greg Sinn and Roger Jameson";

- The PDQ change was made so all inspectors would be the same, but Complainant was not put into the E/PS Tech series as were the other inspectors;
- Complainant was treated differently, although he tried many times to get Sawaged to understand this was not fair;
- Sawaged asked him to have patience since this was started to help Complainant, but also stated the plan was to help Sinn and Jameson because Hayes had gotten her promotion first and they were trying to "make it right" for everyone;
- On January 21, 2004, Complainant observed Sawaged helping Sinn and Jameson rewrite their PDQ's with direction from Kononov to incorporate wording for the GP IV classification, including language from Complainant's duties as the RSA Inspector;
- No supervisor ever helped Complainant to write his PDQ for his advancement or ever offered to help in any way;
- After Lou Lipp promoted Complainant, Scott and Sawaged agreed that after two years as Inspector I, the upgrade would be into the GP III series, a class that was in line for advancement into the Statewide Coordinator's position concerning RSA, which was Complainant's goal;
- Complainant attended Jones Real Estate College, with CDOT paying half his tuition of $1,100.00 and his cost being $560.00, for the purpose of learning real estate law and to reach his goal of getting to the GP series and eventually qualifying for Statewide Coordinator;
- The GP IV classification's concept and purpose of contacts are similar to Inspector I: an independent contributor with regular work contacts with others outside the supervisory chain;
- As relief, Complainant wants his PDQ resubmitted and supported by the RTD for an upgrade to GP III or better and equality, fairness and non-discriminatory action by supervisors and management;

(6) 3 P Rating:

- The rating does not accurately reflect Complainant's performance, Sawaged blames Complainant for communication problems in the unit, the evaluation comments are not accurate, and the 3 P Plan does not make sense;
- As relief, Complainant wants the evaluation comment removed from his file, an overall rating of outstanding, and a plan that reflects RSA for all of Region 6.

On May 4, 2004, Complainant proceeded to Step II of the grievance when he did not receive a response to Step I of his grievance; Step II reiterated the issues from Step I. Muscatell received and reviewed the Step II grievance; gathered evidence and spoke with Scott, retired former manager of the Statewide Outdoor Advertising Program; and spoke with Complainant's supervisor regarding the needs of overall permits program and organizational changes contemplated to meet business needs. Muscatell reviewed Complainant's official timesheet for the past year and applicable rules which are Administrative Procedure P-3-27, CDOT Policy Directives 265.0 and 265.2; reviewed a draft of a detailed business plan describing the proposed changes prepared by Complainant's supervisors and guidelines sent from Headquarters establishing policy pertaining to the Statewide Outdoor Advertising Program; addressed reclassifications, promotions and Complainant's performance rating and plan; requested specifics regarding Complainant's allegations of hostile work environment; and stated the RSA Inspector position would be modified with duties consistent with the new business plan and new PDQ but left the possibility open that if it is unacceptable to Complainant, he would be willing to discuss alternatives.

On June 28, 2004, Muscatell denied the Step II grievance, stating that he spoke with Ron Scott who believes there is enough work to support a full time inspector and since Complainant has not been given the responsibility of a responder, he is not authorized to take a state vehicle home under CDOT Procedural Directive 9.1. Muscatell saw no basis

to justify paying Complainant retroactively as a Tech III for the previous year and no basis for Complainant's overtime claim, and that it was premature for Complainant to request a move into the GP series until the business plan is completed and that his request must fit the department's business needs. The stand-alone RSA Inspector position would be modified and Complainant's position duties will be changed so they are consistent with the new business plan, including writing a new PDQ for all four inspectors. Muscatell further stated that Complainant's performance rating and plan disputes are not grievable and are not addressed in grievance response and in order for Muscatell to act upon the hostile work environment claim, he would need specifics as to dates, times, locations and exactly what was said and who was present.

Complainant asserts the decision to eliminate or modify the RSA Inspector function as a stand-alone function is arbitrary, capricious and contrary to law because Respondent maintains that stand-alone positions suffer when an employee leaves that position; however, Respondent has proffered no evidence that any stand-alone position has suffered in Region 6 when someone has left the program and no evidence exist to support Respondent's contention that the RSA Inspector position has suffered when one leaves. Complainant argues the Statewide Coordinator has always trained others to perform the RSA functions in all regions and the RSA Inspector position exists in all regions as a stand-alone position. Reallocation of this position provides promotional opportunities for others. Complainant questions whether the Utility Unit is attempting to implement reorganization without delegated authority.

Complainant contends the decision to require him to perform the E/PS Tech functions beyond Region 6 without compensation is arbitrary, capricious and contrary to law because Respondent failed to give consideration to the status of Complainant and take steps to have Complainant perform under his official PDQ or to upgrade Complainant to another PDQ that covered the work actually performed. Complainant argues that the evidence shows Respondent had behaved contrary to law by having Complainant work outside his job duties from May 2003 to the present.

Complainant further contends that the decision or proposal to eliminate or modify the RSA Inspector function is pretext to discrimination against Complainant by using Complainant's position to support the upgrade or promotion for two white males within the department. Complainant asserts he can present evidence of a *prima facie* case of intentional discrimination based on his national origin, Hispanic. Complainant contends he suffered disparate treatment in terms of conditions of employment based upon his national origin. Evidence shows a clear pattern of white males within the unit receiving favorable treatment when compared to Complainant. Complainant alleges he was denied sign-off authority on utility permits he processed, was not provided with assistance in writing a new PDQ while others were encouraged and provided with technical assistance by Respondent's manager, performed the same duties as similarly situated white males, and was denied and upgrade to his position. The denial of any promotions was intentional to keep Complainant at a lower job position so he could be subordinate to a white male and to justify white males' promotions to management and supervisory positions.

The Business Plan proposed is to intentionally justify the reallocation of Complainant's job duties, shifting the significant functions of his position to a white male. The denial or refusal to promote Complainant to E/PS Tech II or III was arbitrary, capricious and contrary to law; Respondent put forth a business plan that justifies Complainant's upgrade to a Tech II position and the plan does not explain why Complainant is qualified to be a Tech II but not qualified in June 2003. The denial or refusal to promote Complainant was done intentionally to discriminate against Complainant because his attempts to rewrite his PDQ received different treatment than PDQ's of similarly situated white employees. PDQ's for the white males were supported by all supervisors and

submitted to CDOT's personnel center where they were favorably processed, whereas Complainant's PDQ was never submitted to the CDOT personnel center. Respondent's disparate treatment in the manner in which Complainant's PDQ's were processed when compared to PDQ's of white males in the unit is evidence of intentional discrimination.

Respondent argues that Complainant failed to meet his burden of showing valid issues exist that merit a full hearing. CDOT's personnel specialist determined Complainant did not meet the minimum qualifications for the class series he requested and that his allegations of discrimination are "derived from faulty premises." Respondent asserts the Human Resource specialist reviewed the PDQ and Complainant's qualifications and concluded Complainant did not meet the minimum qualification for the GP III class and that the job duties of his position were correctly classified as the inspector class series.

The minimum qualifications for the GP III class specify, "Graduation from an accredited college or university with a bachelor's degree in a field of study related to the work assignment and two years of professional experience in the occupational field or specialized subject area of the work assigned to the job." The minimum qualifications for the E/PS Tech class series specify, "high school diploma or GED certificate and four years of engineering or physical sciences assistant experience" for E/PS Tech I and for E/PS Tech III position, "seven years of engineering or physical sciences assistant or technician experience."

Respondent asserts Complainant did not meet the minimum qualifications for the E/PS Tech class series in that he does not have four years of engineering or physical sciences assistant experience. One year of "experience" credit has been attributed to Complainant's work in maintenance, an additional six months have been counted for his cross-training in Utilities, and credit will be counted for his continuing work in Utilities based on information submitted by Region 6.

Respondent argues that even with the credit Complainant is still approximately two years short of meeting the minimum qualification for the E/PS Tech I position and had his PDQ been given a formal allocation review and had his position been reallocated to the GP class series, Complainant would have lost the job because the classification goes with the position, not the person. Complainant did not have and does not meet the minimum qualifications for the GP III class. Complainant was advised in April 2003 that CDOT headquarters HR had said Complainant did not meet minimum qualifications for the GP III class. Respondent asserts that in April 2003 Complainant was not told that taking on utilities duties would result in an upgrade to E/PS Tech II and then to E/PS Tech III, nor was Complainant advised that Region 6 management would upgrade him. CDOT headquarters HR personnel specialists decide if a position qualifies for upward reallocation. The decision regarding reallocation of positions of Complainant, Sinn and Jameson to GP class series does not rest with the Respondent, rather with the personnel specialists in the HR office at CDOT headquarters; HR determines reallocation of positions. Respondent further argues the Complainant was told that the addition of utilities work to his experience at CDOT would open a career track with potential to upgrades. Respondent asserts Complainant was offered private tutoring with Kononov; who teaches at the University of Colorado, which Complainant refused.

Sinn and Jameson are E/PS Tech III's; both men are highly trained in construction engineering and have many years of experience in the field. Respondent asserts, like Complainant, Sinn and Jameson do not meet the minimum qualifications for the GP III class series. The PDQ submitted with Complainant's Information Sheet indicates the requested class title change to GP IV for Sinn and Jameson. Complainant's submission of this PDQ was an informal submission to CDOT HR, as was Complainant's PDQ showing a requested class title to GP III. Because Sinn and Jameson do not meet qualifications for the GP IV class series, they have not been and will not be upgraded

from E/PS Tech III to GP IV. Job duties of Sinn and Jameson's positions remain "engineering" and therefore the classification is "engineering" rather than GP.

In May 2004, the Permits Unit took steps to respond to the change in the overall needs of the permits program that had been developing over time. It became clear that organizational changes were necessary to meet changing business needs leading to new goals, including processing more access and utility permits, prioritizing limited resources and intermingling the unit's RSA, access and utilities functions. In early 2004 and in response to the changing business needs of the Permits Unit, Muscatell requested the unit to develop and draft a business plan detailing proposed changes within the unit. Muscatell asked Complainant for input regarding the RSA function, as the RSA function has in the past been a "stand-alone" function in Region 6 Permits Units performed by Complainant.

Based on an in-depth study and analysis of the core business needs of the unit, a Business Plan was drafted on May 17, 2004. After three modifications to the plan, the most recent version dated August 6, 2004, recommends the RSA function no longer to be a "stand-alone" function. Studies of the RSA function in each of CDOT's six regions made and distributed by the Staff Traffic Engineer shows that time spent on RSA duties varied throughout CDOT from 25% (Regions 3, 4 and 5), 30% (Region 1) to 50% (Region 2) and 100% in Region 6, the only region where employee's time is devoted to RSA duties alone.

The Quality Assurance Review (QAR) related to Access Permit Project Design and Construction independently supports the change in business need due to "lack of CDOT staff resources to provide adequate inspection and/or reviews of constructed access permit projects to the state highway system." Complainant stated to Respondent that "for the record" he had "not agreed with any part of" the plan nor did he "agree with it now." Complainant raised issues of permit signing authority and no authority for access and utility permits.

Respondent asserts Complainant's background; experience and CDOT work history does not automatically qualify him for the E/PS Tech class series. The other three members of the Permits Unit currently hold positions in the E/PS Tech class series. Utilities and access permits involve engineering functions within the minimum qualifications and class description of the E/PS Tech class series for which Complainant does not meet the minimum qualifications. Respondent states that Complainant's supervisor asserts that he is not yet ready for permit signing authority for access and utility permits.

Complainant's allegations of discrimination based on national origin are derived from the faulty premises. Complainant did not perform all duties similarly situated white males; rather he cross-trained in some of the duties of the other the members of the Permits Unit who are similarly situated in that all of them hold positions and are experienced in the E/PS Tech class series. Complainant was denied an upgrade to the E/PS Tech position because CDOT personnel specialist determined that Complainant did not meet the qualifications for either the GP class series or the E/PS Tech class series. Respondent argues his statement that the denial of any promotions was intentional and done for the purposes of keeping him at a lower job position so that he could be subordinate to a white male is disingenuous for the same reason and that the Permits Unit Business Plan is a draft in process and Complainant has flatly refused to contribute to the creation of the plan and the development of the plan, which was motivated by documented changes needed of the Permits Unit and was not discriminatory against Complainant.

Respondent contends that Complainant's relief requesting back pay would require that the Board rewrite and reorganize the classified personnel system according to Complainant's dictates and requiring that RSA inspection functions in Region 6 remain

distinct from the utilities inspection functions or in the alternative, that RSA be transferred to another work unit within Region 6 would require the Board to assume the direction and control of Region 6 along with management decisions now the responsibility of RTD. Complainant's request to upgrade or reclassify his position to the GP III level would require the Board to rewrite and reorganize the classified personnel system. The request to reassign Complainant to another supervisor would require the Board to assume the direction and control of Region 6 and management decision, which is the responsibility of RTD. Complainant's supervisor, Sawaged, accepted a transfer to Traffic Design Unit effective November 1, 2004. Respondent argues the actions of CDOT do not meet the criteria for an award of attorney fees and costs and that Complainant's request for back pay, the definition and delineation of the RSA inspection functions, the reclassification of his position and request for attorney fees and cost be denied and dismissed.

The ALJ determined that the grievance decision of Respondent addresses the belief by Ron Scott that there is enough work to support a full time inspector, the fact that there is no basis to justify paying Complainant retroactively as a Tech III for previous year or for overtime allegedly worked, and pursuant to CDOT Procedural Directive 9.1, Complainant had not been given authority to take a state vehicle home. Respondent's decision also addresses the hostile work environment claim by informing Complainant the need for specific dates, locations, times and exactly what was said and to who was present. The stand-alone RSA Inspector position will be modified and duties of the position will change so they are consistent with the new business plan and it is premature to address Complainant's request to move into the GP series until the business plan is completed because his request might fit the department's business needs. Respondent's decision states the performance rating and plan is not grievable and will not be addressed.

The ALJ concluded that Complainant's request for a new supervisor is moot. Complainant's supervisor in question has accepted a transfer to the Traffic Design Unit. James Blake manages the Permits Unit on an interim basis. Respondent used reasonable diligence and care to procure evidence that by law authorized to consider in exercising the discretion vested in him and gave candid and honest consideration to the evidence before him in which he is authorized to act in his discretion. Complainant's assertions that: (1) Respondent's decision or proposal to eliminate or modify the RSA Inspector function as a stand-alone function is arbitrary, capricious and contrary to law; (2) Respondent's decision to require Complainant to perform E/PS Technician functions beyond Region 6 prescribed training periods without compensation is arbitrary, capricious and contrary to law; and (3) the denial or refusal to promote Complainant to E/PS Tech II or III on June 2003 was arbitrary, capricious and contrary to law, are merely bare, unsupported statements of purported facts.

Complainant failed to provide information that would show there is an evidentiary and legal basis that would support a finding that Respondent acted in a manner that was arbitrary, capricious or contrary to rule or law. Respondent's actions are based on conclusions made after gathering and carefully reviewing the evidence. The ALJ contends that those conclusions are reasonable, fair and honest consideration of evidence and a reasonable person would not reach contrary conclusions.

The ALJ found that Complainant has not presented evidence that would establish a *prima facie* case of discrimination. Complainant asserts that the decision or proposal to eliminate or modify the RSA Inspector function is a pretext to discriminate against him. Complainant asserts that Respondent used his position to support the upgrade or promotion of two white males within the department. Complainant provides the refusal to promote him to E/PS Tech II or III was done intentionally to discriminate against him. Complainant belongs to a protected class; however, Complainant has failed to establish that he is qualified for the positions he seeks and failed to present evidence that he suffered an adverse employment decision. Failure to reallocate a position upward is not

included as an adverse employment action. While a failure to promote may constitute a tangible or materially adverse employment decision, Complainant has not presented evidence that he qualified to be promoted or met the qualifications to be promoted to a position in the E/PS Tech or GP class series or that such failure is causally connected to his protected status.

Complainant made conclusory allegations that other employees who were white received reallocations but he did not; however, Complainant does not describe their duties or any other specific information that might give rise to an inference that the failure to upgrade his position was discriminatory. Complainant failed to address the fact that the allocation determination that he did not meet the minimum qualifications of either the E/PS Tech series or GP class series was made by a team of CDOT personnel specialists. Further, the ALJ found Complainant did not provide any information that those specialists were even aware of his national origin, much less the race of other employees whose positions were being reallocated to E/PS Tech series. Complainant failed to meet his burden of proof relative to establishing an inference of unlawful discrimination. Complainant alleges Respondent created a hostile work environment by trying to promote Sinn and Jameson and allowing his supervisor to use a threatening tone, yelling, shaking, and an angry face in his communication with Complainant. Standards for a hostile work environment claim are high; to demonstrate discriminatory intimidation, ridicule or insult, Complainant must establish discrimination. Without establishing a *prima facie* of discrimination, Complainant is unable to support a claim of discrimination; therefore, his allegations of hostile work environment fail.

On April 8, 2005, a Preliminary Recommendation of the Administrative Law Judge was issued, recommending that a hearing be denied.

B. LaVonne Taylor v. Department of Education, Colorado School for the Deaf and Blind, State Personnel Board case number 2004G029.

Complainant, a certified Nurse II, petitions the State Personnel Board to grant a discretionary, evidentiary hearing to review her supervisor's action of filing a complaint against Complainant's license with the Colorado Board of Nursing. Complainant argues that Respondent's actions are arbitrary, capricious and contrary to rule and law and argues that the complaint was filed against her as means of retaliation in violation of C.R.S. §24-50.5-101 *et seq.,* the Whistleblower Act.

Complainant is an employee of the Department of Education, Colorado School for the Deaf (CSDB), and at times relevant to this appeal, Complainant was working in the school's Student Health Center (SHC). On January 6, 2003, Complainant's supervisor became Nancy Greene, R.N.N.P. On August 12, 2003, Greene filed a complaint against Complainant's license with the Colorado Board of Nursing. On August 18, 2003, the Nursing Board received the complaint in which Greene alleges substandard practice on Complainant's part. Greene's complaint detailed allegations against Complainant with a nine-page chart that included the date that each alleged incident was reported, the name of the person making the report, the date of alleged incident, a brief description of the alleged incident or report, and the outcome of each incident or report. The complaint detailed Complainant's failure to properly label an envelope containing a student's medication, inappropriate charting in chart noted on several occasions, failure to make chart notation, failure to follow proper procedure regarding medication cards and cups, failure to sign off on medications, failure to take responsibility for Complainant failure to recognize an infection in an immune compromised patient, and Complainant's leaving a vomiting student unattended. In addition to over 70 specific items of concerns, Greene expresses concern because Complainant had done no self-reporting.

On September 18, 2003, the Nursing Board informed Complainant of the complaint filed by Greene by letter, which was received by Complainant on September 24, 2003. Complainant submitted her response to the complaint to the Nursing Board on October 16, 2003.

The Nurse Practice Act allows the Nursing Board to summarily suspend a nurse's license pending further proceedings in only two instances: (1) when "the agency has reasonable grounds to believe and finds that the licensee has been guilty of deliberate or willful violations " or (2) when "public health, safety or welfare imperatively requires emergency action." Greene's complaint resulted in the summary suspension of Complainant's license to practice nursing.

On October 3, 2003, Complainant filed an appeal with the Board, which included a whistleblower claim regarding Greene's complaint filed with the Nursing Board. Complainant alleges the complaint to the Board was arbitrary and capricious. Complainant argues as an employee of the CSDB for 23 years, she has maintained a good employment record until the retaliation for her whistleblowing activity.

Complainant asserts that since 1999 on numerous occasions, she has brought several issues of substandard care, dangerous or illegal practices, communication issues and personality issues to the attention of CSDB. Complainant has expressed concerns of substandard practice, unethical practices, medication impropriety, altering or destroying records, and failing to report sexual assault, and alleges that witnesses and exhibits support other egregious improprieties. Complainant's motivation was for the best interest of the students, SHC staff, and the State of Colorado. The issues she raised placed the students in jeopardy and the staff and State in a position of liability. Complainant argues at least three other nurses in the SHC had vendettas against her for her efforts to make SHC a safe environment for students and staff.

Complainant argues Greene reported her to the Nursing Board based on false and fraudulent information submitted by Jim Heidelberg, Cindy Sturm and Brenda Ernst, while failing to report them for their illegal, dangerous and substandard practice issues and failing to get Complainant's side of the story. Dr. Marilyn Jaitly, in her letter dated October 23, 2002, to Complainant expressed her concerns relating to the management and operations of SHC, including the appropriate performance of nursing duties by SHC staff, communication and lack of team effort, as well as the lack of adequate procedures relating to SHC functions, nursing practices, including the delivery of health services to students, and the difficulty associating responsibility for these concerns with an individual staff member. Dr. Jaitly states that in order to address these issues and "hold all staff accountable to a greater degree," a consultant will be hired to review and assist in the development of adequate policies and procedures related to SHC functions, nursing practices and evaluation of operations of SHC and the provision of written recommendations, staffing changes and specific expectations will be discussed with all SHC staff." The conclusion of the letter states "these recent events/ issues will provide a basis for implementing significant and positive changes in SHC." Complainant argues Dr. Jaitly's decision failed to take into account the retaliatory actions taken against her.

Complainant argues the evidence shows she was dealt with in an arbitrary and capricious manner and was treated differently and more harshly than those she was trying to get to practice safe, ethical and legal nursing. Complainant asserts the complaint submitted by Greene demonstrates she has a pattern of behavior and argues Greene did not observe her, only became aware of behavior second-hand, and raised allegations which were previously brought to the Board's attention. Complainant asserts she was on Family Medical Leave during the time the allegations were brought to the Board and Greene's allegations contain vague, non-specific and unsupported allegations, as set forth in Complainant's October 16, 2003 response to the Board.

Complainant provided the Board with a copy of a statement from a co-worker (who requested that her identity not be disclosed for fear of retaliation from Greene or others at CSDB), indicating that there seems to be a conspiracy to get rid of Complainant. She asserts a former nurse at CSDB was asked to spy on her and that CSDB refused to hear reports of irregularities committed by another CSDB nurse and the reports made to CSDB personnel, supervisors and administration were not reported to the Nursing Board to Complainant's knowledge, although CSDB administrators admit knowing that the practices were occurring and were aware that some of the activities were illegal. Complainant argues the referenced acts of CSDB and its agents are arbitrary and capricious. Complainant requests the report submitted to the Nursing Board be withdrawn and "the pattern of retaliation against her for whistleblowing activities stop" and that she be awarded attorney fees and costs.

Respondent argues that Complainant failed to meet her burden of showing that valid issues exist that merit a full hearing and the action token by Respondent was not a violation of the Whistleblower Act. Respondent asserts that the complaint submitted by Greene to the Nursing Board sets forth detailed allegations along with supporting documentation of numerous deficiencies in Complainant's nursing duties in the 2002-2003 school year. Complainant's care, pattern and practice of failing to meet generally accepted standards of nursing practice constituted a danger to children. Complainant's whistleblower claim was referred to the Personnel Director for an investigation and the investigator concluded that there was no reasonable basis to indicate Complainant was retaliated against for her whistleblowing activity. Respondent argues the Personnel Director noted that the evidence indicates that the complaint to the Nursing Board was not submitted in response to any alleged disclosure to the Nursing Board but rather "in response to Complainant's work performance."

The ALJ found that Respondent's actions were not arbitrary and capricious based on the evidence. It cannot be said Respondent neglected or refused to use reasonable diligence and care to procure evidence and information it is authorized to consider in making a decision to file a complaint against Complainant's license with the Nursing Board. Greene's complaint and detailed chart contained specific allegations against Complainant. The chart makes it apparent that Greene use reasonable diligence in gathering and considering all relevant evidence before making her decision to file a complaint. The ALJ finds Complainant's own Information Sheet acknowledges that the Nursing Board summarily suspended her license. Complainant's license could not be summarily suspended unless "the agency has reasonable grounds to believe and finds that the licensee has been guilty of deliberate and willful violation or that the public health, safety or welfare imperatively requires emergency action." Based on the evidence reasonable persons fairly and honestly considering the evidence would not reach a conclusion contrary to that reached by Respondent in filing a complaint against Complainant's license with the Nursing Board.

The ALJ determined that Complainant seeks relief, which does not include a finding of liability against Greene, requests to have the complaint withdrawn and the "pattern of retaliation against her for whistleblowing activities stop," and requests attorney fees and costs. The ALJ found that the investigator for the Department of Personnel and Administration concluded there is no reasonable basis for Complainant's whistleblower complaint and Complainant does not have a constitutional or statutory right to a hearing based on Board Rule R-8-27.

Complainant's disclosures regarding dangerous and illegal nursing practices, if true, are examples of the types of disclosures contemplated by the Whistleblower Act. Section 24-50.5-103(2) C.R.S. requires Complainant to make a subsequent disclosure to someone other than her supervisors or appointing authority. She has satisfied this obligation and

in addition to disclosing the information regarding substandard nursing practices to her supervisors, Complainant made disclosures to a number of other people. Some of those disclosures were made subsequent to disclosures made by Complainant to her supervisors. Complainant has established that her disclosures constitute a protected disclosure pursuant to the Whistleblower Act. Complainant must establish that her protected disclosure was a substantial and motivating factor for the complaint Greene filed against Complainant's license. However, Complainant failed to establish her disclosures motivated Greene in any way and the complaint filed with the Nursing Board reported many specific examples of substandard nursing practice of Complainant's behalf that Greene personally observed or that were reported by others.

The ALJ concluded that given the specificity and careful documentation of each item of concern and the fact the Nursing Board summarily suspended Complainant's license after receipt of Greene's complaint, the complaint filed with the Board of Nursing was well founded as evidenced by the summary suspension. Greene was not motivated by Complainant's disclosures when her complaint was filed with the Board of Nursing, but by her performance and reports of substandard nursing practices on Complainant's part.

On April 15, 2005, a Preliminary Recommendation of the Administrative Law Judge was issued, recommending that a hearing be denied.

C. Victor Pochon v. Department of Human Services, Colorado Mental Health Institute at Fort Logan, Nursing Service Administration, State Personnel Board case number 2005G064.

Complainant, a certified Mental Health Clinician II at the Department of Human Services, Colorado Mental Health Institute at Fort Logan (CMHI), petitions the State Personnel Board to grant a discretionary, evidentiary hearing to review the appointing authority's response to his grievance. He argues the final grievance decision was arbitrary and capricious because he was hired to work with adults but has been told that he may temporarily be assigned with work in other units which serve children and adolescents, based on staffing needs.

Supervisor Andrew Cieciorka approached Complainant and other staff in 2004 regarding work in the Adolescent Inpatient Services Unit (AIS). Complainant and staff were asked if they would be willing to work in AIS on a temporary or as-needed basis to offset staffing shortages. Complainant was not willing to accept temporary assignment and on November 15, 2004, had an informal discussion regarding the Step I grievance based on the possibility that he could be temporarily assigned to other units. Complainant asserts that on November 24, 2004, he filed his Step II grievance with Assistant Nursing Administrator, Holly Lutz, Complainant's second line supervisor. Complainant's grievance relates to the expectation that he will be coerced into working with a population of clients that he was not hired to work with and does not have the aptitude to provide therapeutic interventions for those clients, specifically, children or adolescents with mental illnesses from the Division of Youth Corrections.

As a relief, Complainant requests that he be allowed to do work that he was hired for, which is to provide therapeutic interactions for adults who suffer from serious and persistent mental illness. He states he is not floated to a unit that serves children, adolescents with mental illness and/ or youth offenders and asserts that he is fearful that he will be hurt, the clients of those units will be hurt, and the therapeutic effectiveness of those units will be further compromised. On November 30, 2004, Complainant's Step II grievance was denied, and on December 6, 2004, he filed his grievance with his third line supervisor, Debbie Arrera, Nursing Service Administrator II. He met with and discussed his grievance with Arrera on December 20, 2004, and received a letter denying his grievance on December 29, 2004.

Complainant provides that on January 1, 2005, two staff members were brutally assaulted in the AIS unit at CMHI at Fort Logan. A violent male patient from youth corrections ambushed two nurses during the night shift. The patient used a pen like a knife, sticking it into the side of the head of one of the staff members and narrowly missing her eye. The patient then used his forearm to strangle her from behind while another nurse scrambled to hit the alarm. The patient proceeded to the nursing station to attack a second nurse on duty, kicking and knocking her about, managing to get her keys to the unit for an escape. A large male staff member responded to the alarm and placed the offender in a locked secluded room.

Complainant argues that if the nurse had been unable to get to the alarm, the offender would have clearly escaped. Both nurses were taken to an emergency room for treatment. Less than 12 hours after the incident, the team leader of that unit returned the patient back into the general population where he could engage in his bragging rights to other patients/inmates. Complainant states that, fortunately, staff with better safety judgment managed to prevent release into the general population of this patient. Complainant argues that if this were an isolated incident, any staff would volunteer to fill in for fellow staff in emergencies; however, it is a continuing pattern of violent acts perpetrated by DYC offenders who are placed in the psychiatric unit and have learned they will only get a slap on the hand as a consequence. Complainant contends riots have broken out in AIS unit where patients organize attacks on staff or other patients. Complainant argues leadership of that unit is at a loss as they struggle to keep staff and patients safe and to keep a treatment program from becoming a containment program.

Complainant asserts he is not the only staff member at Fort Logan who is not willing to be forced into such an environment. He and others got into this type of work because they wanted to help others who are struggling with mental and emotional problems. Complainant has developed his skills in providing treatment to adults who suffer from mental illness. He has had brief experience working with children and adolescents who were in much healthier unlocked situations and he contends he stopped working with the younger population because he was unable to set effective limits or maintain therapeutic boundaries. He believes Respondent has lost sight of its own clinical judgment by pressuring staff to fill staffing shortages. Complainant asserts that if Respondent were to allow him a positive conclusion to his grievance, it would lose its leverage in demanding to put others into the same dangerous situation in which the hospital nursing staff was placed. Complainant further asserts Respondent would lose fewer staff if it would allow development of other solutions to staff shortages.

Complainant provides that many staff members have chosen to avoid going to AIS, leaving younger, more naïve staff to patch up staffing shortages. Complainant's grievance was not filed until his supervisor told him that the practice to allow Complainant to float only to adult teams to cover shortages would no longer be allowed. He argues that a valued co-worker was confronted with the same change in practice and has left employment based on the practice change. Further, he asserts that in January 2005, two staff from the children's unit refused to float at AIS, fearing their safety. Complainant claims other staff members have spoken to him with a promise on Complainant's behalf that he would not disclosure their names for fear of being blacklisted.

Complainant argues that when he was hired at Fort Logan in 1994, the possibility of working with adolescents was not considered by Complainant or the Division of Psychiatric Services for Children and Adolescents because of Complainant's lack of special knowledge, skills, and experience. He was told to sign a form stating he agreed to float to any unit if any emergency situation existed. At the time, he was reassured that the likelihood of being floated to a special needs unit was not likely due to the strict requirements of staff for those populations. He agrees but contends that emergency staffing situations have occurred with an increasing frequency, creating a negative

degenerative cycle of chewing up staff and lowering the requirements of necessary skills to maintain an illusion of therapeutic legitimacy.

In 14 months, 22 staff members have been assigned to the AIS unit and have left by either quitting or transferring. Complainant argues there should be existing interviews resulting from the staff turnover, which would reflect the safety concerns of having criminal mix in AIS. He contends that new staff members assigned or hired do not have the same degree of expertise in handling the milieu. Complainant argues that the experienced staff members become targets for the patients who act out, who are by and large the DYC patients, comprised of a maximum of 6 adjudicated and 5 non-adjudicated male adolescents from youth corrections. When staff members float to AIS unit, they are providing more of a security function than a therapeutic function. Complainant claims the need is control over the violent and volitional assaultive behavior. Few staff have been educated or trained in working with correctional departments and those staff members who have also worked with the Department of Corrections do not have the organized structure to properly handle young offenders who have severe behavioral problems. Young adolescents who have major psychiatric problems and placed in AIS unit have a slim-to-no chance of benefiting from being hospitalized with current existing conditions.

Float staff to unit staff ratios have been set for a 50/50 ratio to insure at least half of the staff would know what the unit expectations are. Unit staff has been hired out of school or with no experience with this special population. Some float staff may have more experience than the AIS staff with the population. Few AIS staff members have previously experienced working with DYC and their concerns are largely ignored. Pool staff members have been hired to fill in on shortages on all units, and all share concern for safety in the dangerous work setting at AIS.

Respondent argues Complainant failed to meet his burden of proof of showing valid issues exist that merit a full hearing and that Respondent's actions were not arbitrary and capricious. Respondent contends that in February or March of 2004, Complainant's supervisor approached him and other staff members to inquire whether anyone would be willing to "float" to the AIS on a temporary and as-needed basis to offset a staffing shortage. Complainant adamantly said he did not want to float to the AIS unit and stated, "If you send me over there… I can't be responsible for my actions."

On March 8, 2004, Complainant attended a meeting with Cieciorka and Lutz to discuss the issue. During the meeting, Complainant stated in part, " I know my limits…I'm not going to change…I don't want to go to classes on AIS… If they [the patients in AIS Unit] hit me, I'll get back up and knock them down." Respondent in response offered Complainant additional training and offered to send Complainant to the AIS Unit to orient him but he declined. Respondent contends that given his adamant aversion to working in the AIS unit and his suggestion that he might physically assault the juvenile patients, Respondent never required Complainant to work in that unit. Respondent relied on other staff members to float to the AIS unit. Complainant did not float in the AIS unit between January 2004 and February 2005.

The Position Description Questionnaire (PDQ) of Complainant's work unit reads, "This work unit exists to … Provide specialized, intensive inpatient treatment services to 25 mentally ill patients on a 24 hour locked inpatient unit who are to considered high risk assaultive and severely mentally ill. The goal is to assess/ evaluate treat and return to the community adults with major mental illnesses." The PDQ further provides that "This position exists to… Provide therapeutic work in the psychiatric care of mentally ill patients hospitalized at CMHIFL. Primary responsibilities are applications of knowledge, expertise in providing safe and effective patient care." Respondent asserts that paragraph III (A) of the PDQ states, in part, "**Duty Statement:** Treat and supervise persons with psychiatric disorders." Paragraph X of the PDQ (Additional Requirements),

states the position requires that Complainant "be willing to work in a potentially assaultive environment…[and] to be flexible in schedule." Respondent contends that Complainant has been involved in at least two assaultive situations with adult patients. Despite his aversion to working with the juvenile in the AIS unit, Complainant knows or should know that he can be assigned to this unit to fill staffing shortages. Respondent argues that when he was hired to work at Fort Logan, he signed a document entitled, "Information for New Nursing personnel at Fort Logan Mental Health Center." The document provides that all scheduling is planned at the discretion of the Team Leader and Head Nurse to meet program and patient care needs. The document also provides "in extraordinary circumstances it may be necessary to assign you temporarily to other work units. If this should occur, you will be oriented to that unit." Respondent argues that to ensure Complainant could work in other units, including a unit with juveniles, he received training in working with other patient groups and has passed various assessments concerning juvenile patients.

The ALJ finds that Respondent informed Complainant and other staff that it may, at times, needs to temporarily assign staff to different units to meet needs of the Fort Logan Mental Health Institute. Complainant grieved the potential situation of being assigned temporarily to the AIS unit, although at the time of his grievance and time of his appeal, he had not yet been given such assignments. Board Rule R-8-8 (1) provides that an employee must initiate the grievance process within 10 days after the employee has knowledge of or reasonable knowledge of the action or occurrence. In this case, the ALJ found that no action or occurrence had taken place, only the potential for one. Thus, the ALJ finds that Complainant's grievance is not ripe for review. The ALJ concludes that even if Complainant's grievance were ripe, he failed to establish that valid issues exist that merit a hearing. His information sheet provided examples of how staffs in the AIS unit were exposed to dangerous situations; however, Respondent had made an adequate demonstration that it has the discretion to assign Complainant to different units, including the AIS unit, if the needs of the Institute mandated so. Complainant failed to demonstrate that a hearing would be appropriate on the issue of Respondent's right to reassign staff members to address its needs.

Board Rule R-1-6 provides, in part, "Appointing authority powers include, but are not limited to…defining a job…determining work hours and safe conditions and tools of employment…" Accordingly, the ALJ finds that Respondent used its discretion to determine its staffing needs. The ALJ concludes that when he was hired, he signed a document entitled, "Information for New Nursing Personnel at Fort Logan Mental Health Center." The document stated, "all scheduling is planned at the discretion of the Team Leader and Head Nurse to meet program and patient care needs." Section 1.d of the document provides that in extraordinary circumstances (e.g. patient need, staffing crisis or other natural disaster), it may be necessary to assign someone temporarily to other work units. If this should occur, the staffer will be oriented to that unit.

The ALJ finds Complainant had knowledge at the time of his hire that he might be required to work temporarily in other units. Complainant argues he does not have adequate training to work in the AIS unit; however, Complainant has been trained and is deemed competent in all age categories, including child and adolescent populations. The ALJ determined Complainant did not meet his burden showing valid issues exist which merit a full hearing.

On May 10, 2005, a Preliminary Recommendation of the Administrative Law Judge was issued, recommending that a hearing be denied.

D. Chanel Elaine Boyce-Dixon v. Department of Human Services, Colorado State Veterans Home at Fitzsimons, State Personnel Board case number 2005G055.

Complainant, a probationary Barber/Cosmetologist employed by the Department of Human Services, Colorado State Nursing Home at Fitzsimons, petitions the State Personnel Board to grant a discretionary, evidentiary hearing to review the appointing authority's termination of her employment. Complainant argues that her termination for failure to hold a cosmetologist license was arbitrary and capricious because her licensing status was known at the time of hire.

Complainant's position was posted and advertised as a Barber/Cosmetologist position with duties including the provision of hair care services, manicures and pedicures. The provision of skin care services was not listed as a duty when posted. The Position Description Questionnaire (PDQ) for the position listed the minimum requirement for the position as a high school diploma or GED. The special requirements for the position were: (1) the applicant must be licensed by the Colorado Board of Barbers and Cosmetologists (the "B&C Board") and a copy of the license must accompany the application; (2) the applicant must pass both the Federal Bureau of Investigation and the Colorado Bureau of Investigation background check; and (3) the applicant must pass a drug screen. The PDQ stated the provision for hair care services would comprise 60% of the job duties and nail care services would comprise 20% of the job duties.

Complainant's application states that she holds two different licenses, a cosmetician license and a manicurist license. After review of Complainant's application by a Human Resource Specialist, Complainant was referred to the facility for an interview and was hired during the month of May 2004. Complainant's skill set was what the facility needed; there was a licensed cosmetologist on staff whose skills were complementary to those of Complainant. The licensed cosmetologist performed hair and chemical services, manicures, pedicures, nail trim and file services along with ingrown nail services, hair braiding services, and skin care services.

Complainant contends the facility began to admit new residents and coupled with the inability of Complainant to provide hair care services, this resulted in the licensed cosmetologist not being able to keep up with demand. When the appointing authority became aware of this situation, she met with Complainant to ask her to find out how long it would take for her to become a licensed cosmetologist. It would take over a year at considerable expense to license Complainant as a cosmetologist. Respondent, on November 24, 2004, informed Complainant her employment with Respondent was terminated because she did not possess a Cosmetologist license and, therefore, was unable to perform her duties in providing hair care. The termination notice stated, "We deeply regret this occurrence and would like to assure you that this in no way reflects on the quality of work." On December 1, 2004, Complainant was placed on paid administrative leave through December 27, 2004, to allow her the opportunity to pursue other job opportunities, on which date she was terminated.

Complainant requests a hearing be granted and states that Respondent was aware, throughout the interview process, of the type of license Complainant held. She asserts if there is any negligence, it followed a chain of incompetence starting with the minimum requirements and special requirements requested in the initial posting of the position, through to review of her application by the Human Resource Specialist, her skills, past experience, qualifications and license that qualified her for the position.

Respondent argues that it made an error in hiring Complainant in that it misunderstood that a cosmetician license was not a cosmetologist license and argues that, given the duties of Complainant's position, it was not arbitrary, capricious or contrary to rule or law to terminate Complainant. Respondent requests that Complainant's petition for hearing be denied as Complainant failed to meet her burden of showing valid issues exist that merit a hearing. Respondent asserts that the PDQ required the applicant holding this position to be a licensed cosmetologist, whereas Complainant is a licensed cosmetician.

A cosmetician cannot perform hair care services.

The Human Resource Specialist was not aware of the essential difference in the cosmetologist and cosmetician licenses. The referral of Complainant for an interview should not have been made and the appointing authority was not made aware of any licensing issues. Respondent contends the initial arrangement of having Complainant and the cosmetologist worked well because the population of the facility was stagnant due to a freeze on new admissions.

The ALJ concludes that Respondent terminated Complainant's probationary employment because Complainant did not posses a cosmetologist license and therefore, was unable to provide hair care services. Complainant's termination was not for unsatisfactory performance; therefore, Complainant has the same rights to a hearing as a certified employee. Respondent argues Complainant did not meet the requirements for the position and could not fulfill the duties for the position; therefore the termination from employment was appropriate. Complainant argues Respondent was fully aware of her licensing status both before and after the interview and hiring process. The ALJ concludes Complainant's termination was arbitrary, capricious and contrary to rule or law.

Complainant's application states that she has a cosmetician and manicurist license. Both of these licenses, along with other types of licenses, are issued by the B&C Board. A licensed "cosmetician" may provide skin care services, a licensed "manicurist" may provide nail services, a licensed "cosmetologist" may provide hair, nail and skin services. Both the PDQ and the posting for Complainant's former position state that a special entry requirement is that the applicant must possess a license issued by the B&C Board. There are no references in either document to a specific type of license issued by the B&C Board.

The ALJ finds that Complainant's application went through a screening process and Complainant was interviewed, and Respondent states that it does not allege that Complainant obtained her position through any misrepresentation or wrongdoing. While the Human Resource Specialist may have been confused and the appointing authority was "not made aware" of any licensing issues, the ALJ contends that the information demonstrates she met both the minimum and special entry requirement for the position. Respondent argues that she could not fulfill the duties of the position. When she began to work for the agency, despite the division of duties delineated in her PDQ, she was assigned solely to the provision of nail and skin care services to Respondent's clients. The licensed cosmetologist provided all of the hair care services to Respondent's clients. The information supports a possibility that someone in Complainant's chain of command was aware of the limitations on the provision of services imposed by her licenses.

The ALJ finds that while the PDQ for Complainant's position states that her position was to spend 60% of its time on the provision of hair care services and the posting for the position states such services are one of the duties of the position, Respondent's treatment of Complainant's assignment of solely skin and nail care services belies those statements. Respondent exercised the appointing authority's discretion to define a job by assigning Complainant specific duties. The assignment of those duties were both within the scope of the appointing authority's discretion and assignment of duties to a position. The ALJ concludes that to hire Complainant after reviewing her credentials and licenses, assign her solely to the provision of nail and skin care services, then decide after she has performed satisfactorily in the position for six months, that she cannot fulfill the duties and without any further process or procedure, terminate her employment appears facially to be exercising discretion in an unreasonable manner. As such, it may constitute arbitrary and capricious behavior under *Lawley.* This possibility is bolstered by the combination of Complainant meeting the entry requirements for the position and the lack of any allegations that Complainant tried to obtain the position under false pretenses. The ALJ

finds valid issues exist that merit a hearing.

On June 9, 2005, a Preliminary Recommendation of the Administrative Law Judge was issued, recommending that a hearing be granted.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

There are no Initial Decisions or other Final Orders of the Administrative Law Judges or the Director before the Board this month.

VI. REVIEW OF THE MINUTES FROM THE MAY 17, 2005 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS MAY 17, 2005 PUBLIC MEETING:

A. Department of Human Services, State and Veterans Home at Fitzsimons, State Personnel Board case number 2005R007.

The Board voted to deny the Request for a Residency Waiver for positions of Nursing Home Administrator (General Professional VII) and Director of Admissions (General Professional III) and voted to grant the Department of Human Services leave to file for reconsideration of its Request for Residency Waiver, if it would supplement its request with additional information including market data which demonstrated a systemic problem in filling these positions.

B. Ken McCutcheon v. Department of Corrections, State Personnel Board case number 2005S009.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

C. Lucille Dorsett v. Department of Military and Veterans Affairs, Division of Veterans Affairs, State Personnel Board case number 2005G048.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts
- *Stateline* - "State Personnel Board to Hold Election"

B. OTHER BOARD BUSINESS

- Update on Legislation
- Update on Office Move
- Selection of New Director

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. EXECUTIVE SESSION

A. Case Status Report

B. Minutes of the May 17, 2005 Executive Session

C. Other Business

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NEXT REGULARLY SCHEDULED BOARD MEETINGS - 10:30 a.m.

July 19, 2005	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**
August 16, 2005	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**
September 20, 2005	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**
October 18, 2005	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**
November 15, 2005	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**
December 20, 2005	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**